Re Chong Kim Far; ex parte Danaharta Urus Sdn Bhd

HIGH COURT (IPOH) — BANKRUPTCY NO 29–616 OF 2007
LEE SWEE SENG JC
17 APRIL 2013

Bankruptcy — Discharge — Application — Conditional discharge granted — Appeal against order — Whether dividend of 0.86% and conditional discharge was too low — Whether report of DGI was inadequate for purpose of forming opinion as to whether JD should be given conditional discharge — Whether public interest and commercial morality would be served by granting conditional discharge order — Bankruptcy Act 1967 s 33(1), (4) & (6)

Lee Chee Peau ('Lee') and his wife, the judgment debtor ('the JD') had stood as guarantors for a loan taken by Top In Footwear (M) Sdn Bhd ('the company'), a company in which Lee had 80% equity and the JD 20%. When the company's business failed and the company defaulted on its loan, judgment was taken against the guarantors for the sum of RM7,009,440.56 with interest and costs. Subsequently, bankruptcy proceedings were taken against Lee and he was adjudicated a bankrupt on 26 July 2001. Despite the objections of the judgment creditor ('the JC'), Lee applied for and obtained a conditional discharge on 20 February 2009. After Lee had obtained a conditional discharge of his bankruptcy, the JC had proceeded with a bankruptcy action against the JD and she was made a bankrupt on 3 December 2009. This was the JD's application for an order of discharge of her bankruptcy under r 194 of the Bankruptcy Rules 1969. The JD, a housewife and mother of three children aged 12, 16 and 18 respectively, claimed that her liability arose upon signing an unlimited guarantee for the loan taken by the company controlled and managed by Lee. The report of the Director General of Insolvency ('DGI') stated, inter alia, that the JD was earning an income of RM300 per month as a babysitter, and that from this income she had been paying a sum of RM50 per month towards the discharge of the judgment sum. The DGI also confirmed in its report that the JD had not been convicted of any offences referred to in s 33(4) of the Bankruptcy Act 1967 ('the Act') and had been regular in her monthly payments. The JC objected to the discharge. The senior assistant registrar allowed the JD's discharge of her bankruptcy on condition that the JD consented to a judgment being entered by the DGI for the balance outstanding of the debt proved of RM2,566,377.03. This was the JC's appeal to a judge in chambers against that judgment. The JC submitted, inter alia, that the dividend proposed to be declared of 0.86% for a balance of RM2.5m was too

low considering the period of bankruptcy of two years and six months and the JD's age of 44.

Held, dismissing the appeal with no order as to costs:

(1) As the JD's application for a discharge in the present case was not made under s 33A(2) of the Act but under s 33(1) of the Act, there was no minimum period of bankruptcy before which an application to discharge may be entertained. However, it would be fair and reasonable that the period of bankruptcy and other factors like the age of the bankrupt, the conduct of the bankrupt with regard to the monthly repayment schedule, the capacity of the bankrupt to pay, the circumstances under which the loan was given and the issue of prejudice caused to the JC were taken into consideration. Whilst the period of bankruptcy in the present case was only two years and six months (and by now three years) and the JD was 42 years old, yet the circumstance under which the loan was taken was relevant. The loan was essentially for the JD's husband's business, which failed. The JD's role was that of a housewife raising her three children, but her token 20% equity in the company had necessitated that she guarantee the full amount of the loan. Now that the JD's husband had been discharged the JC had sought to make her a bankrupt. In the light of these extenuating and excusing circumstances, the order of a conditional discharge was reasonable and could not cause any prejudice to the JC as execution could always be proceeded with leave of court should the JC have proof subsequently that the JD had since her discharge acquired property or had income available for payment of her debts (see paras 22, 29 & 32).

(2) The JC's criticisms against the DGI's report being brief and silent on the circumstances set out in s 33(6) of the Act was misconceived. Section 33(6) of the Act would only be relevant and applicable in a case under s 33(4) of the Act where the bankrupt had committed an offence under the Act or under the Penal Code. The report of the DGI had outlined the present circumstances of the JD and the fact that she had been faithfully paying RM50 a month to the DGI. Thus, there were no merits in the submission that the report of the DGI was insufficient or inadequate for the purpose of forming an opinion as to whether the JD should be given a conditional discharge (see paras 35, 37, 40 & 45).

(3) In an application for discharge, each case had to depend upon its own individual circumstances. In the present case, the accumulated interest had aggravated the debt owing to the JC. Although judgment was entered against the JD for about RM7m, the DGI only entered judgment against her for about RM2.5m, being the balance debt proved by the JC. The circumstances of this case taken as a whole would dictate that public

interest, policy and morality would not be compromised if the order of conditional discharge was affirmed (see paras 49–50 & 58).

[Bahasa Malaysia summary

Lee Chee Peau ('Lee') dan isterinya, penghutang penghakiman ('JD') telah bertindak sebagai penjamin-penjamin bagi pinjaman yang diambil oleh Top In Footwear (M) Sdn Bhd ('syarikat tersebut'), sebuah syarikat yang mana Lee mempunyai 80% ekuiti dan JD mempunyai 20%. Apabila perniagaan syarikat tersebut gagal dan syarikat mungkir dalam pinjaman, penghakiman dimasukkan terhadap penjamin bagi jumlah sebanyak RM7,009,440.56 dengan faedah dan kos. Seterusnya, prosiding kebankrapan diambil terhadap Lee dan dia diisytiharkan sebagai bankrap pada 26 Julai 2001. Walaupun bantahan dibuat terhadap pemiutang penghakiman ('JC'), Lee memohon dan berjaya mendapat pelepasan bersyarat pada 20 Februari 2009. Selepas Lee berjaya mendapat pelepasan bersyarat bagi kebankrapannya, JC meneruskan dengan prosiding kebankrapan terhadap JD dan dia diisytiharkan bankrap pada 3 Disember 2009. Ini adalah permohonan JD bagi mendapatkan perintah pelepasan kebankrapan di bawah peraturan 194 Kaedah-Kaedah Kebankrapan. JD, seorang suri rumah dan ibu kepada tiga orang anak, masing-masing berusia 12, 16 dan 18 mendakwa bahawa liabilitinya timbul apabila dia menandatangani jaminan tidak terhad bagi pinjaman yang diambil oleh syarikat yang dikawal dan diuruskan oleh Lee. Laporan Ketua Pengarah Insolvensi ('KPI') menyatakan, antara lain, bahawa JD memperolehi pendapatan sebanyak RM300 sebulan sebagai pengasuh, dan bahawa daripada pendapatan ini, dia telah membayar sebanyak RM50 sebulan bagi pelepasan jumlah penghakiman. KPI juga mengesahkan dalam laporan beliau bahawa JD tidak pernah disabitkan dengan sebarang kesalahan yang dirujuk di bawah s 33(4) Akta Kebankrapan 1967 ('Akta') dan konsisten dalam pembayaran bulanannya. JC membantah pelepasan tersebut. Penolong Kanan Pendaftar membenarkan pelepasan kebankrapan JD dengan syarat JD bersetuju dengan penghakiman yang dibuat oleh KPI untuk baki tertunggak hutang yang dibuktikan sebanyak RM2,566,377.03. Ini adalah rayuan JC kepada hakim dalam kamar terhadap penghakiman tersebut. JC menghujahkan, antara lain, bahawa dividen yang dicadangkan hendak diisytiharkan iaitu sebanyak 0.86 % bagi baki RM2.5 juta adalah terlalu rendah memandangkan tempoh kebankrapan adalah dua tahun dan enam bulan dan umur JD adalah 44 tahun.

Diputuskan, menolak rayuan tanpa perintah terhadap kos:

(1) Oleh kerana permohonan JD untuk pelepasan dalam kes ini tidak dibuat di bawah s 33A(2) Akta tetapi di bawah s 33(1) Akta, tidak ada tempoh minimum kebankrapan yang mana sesuatu permohonan untuk pelepasan boleh didengar. Walau bagaimanapun, adalah adil dan munasabah bahawa tempoh kebankrapan dan faktor-faktor lain seperti umur bankrap, perilaku bankrap berkenaan jadual pembayaran balik

bulanan, keupayaan bankrap untuk membayar, keadaan di mana pinjaman diberikan dan isu mengenai prejudis terhadap JC telah dipertimbangkan. Walaupun tempoh bankrap dalam kes ini hanya dua tahun dan enam bulan (dan kini tiga tahun) dan JD berumur 42 tahun, namun hal keadaan di mana pinjaman tersebut diambil adalah relevan. Pinjaman ini pada dasarnya adalah untuk perniagaan suami JD, yang mana gagal. Peranan JD adalah sebagai seorang suri rumah membesarkan tiga orang anak-anaknya, tetapi token 20 % ekuitinya dalam syarikat tersebut memerlukan dia menjamin jumlah penuh pinjaman. Memandangkan kini suami JD telah dilepaskan, JC berusaha mengisytiharkannya seorang bankrap. Dalam hal keadaan yang meringankan ini, perintah pelepasan bersyarat adalah munasabah dan tidak boleh menyebabkan apa-apa prejudis terhadap JC kerana pelaksanaan sentiasa boleh diteruskan dengan kebenaran mahkamah sekiranya JC mempunyai bukti terkemudian bahawa JD, sejak pelepasannya telah membeli hartanah atau mempunyai pendapatan untuk membayar hutang tersebut (lihat perenggan 22, 29 & 32).

(2) Kritikan-kritikan JC terhadap laporan KPI sebagai ringkas dan tidak memperincikan tentang hal keadaan yang dinyatakan dalam s 33(6) Akta adalah satu salah tanggapan. Seksyen 33(6) Akta hanya akan menjadi relevan dan terpakai dalam kes di bawah s 33(4) Akta di mana bankrap telah melakukan satu kesalahan di bawah Akta ini atau di bawah Kanun Keseksaan. Laporan KPI telah menggariskan hal keadaan semasa JD dan fakta bahawa dia telah konsisten dalam membayar RM50 sebulan kepada KPI. Oleh itu, tiada merit dalam hujahan bahawa laporan KPI tidak mencukupi atau tidak sempurna bagi maksud membentuk pendapat sama ada JD perlu diberi pelepasan bersyarat (lihat perenggan 35, 37, 40 & 45).

(3) Dalam permohonan untuk pelepasan, setiap kes perlu berasaskan pada hal keadaan masing-masing. Dalam kes ini, faedah yang terkumpul telah memburukkan lagi hutang kepada JC. Walaupun penghakiman telah dibuat terhadap JD sebanyak kira-kira RM7 juta, KPI hanya memasukkan penghakiman terhadapnya sebanyak kira-kira RM2.5 juta, iaitu baki hutang yang dibuktikan oleh JC. Hal keadaan kes ini, diambil secara keseluruhan, menentukan bahawa kepentingan awam, polisi dan moral tidak akan terjejas jika perintah pelepasan bersyarat telah disahkan (lihat perenggan 49–50 & 58).]

Notes

For cases on application, see 1(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3025–3038.

Cases referred to

Development & Commercial Bank Bhd & Ors v Loke Theen Fatt [2009] MLJU 1443; [2010] 5 CLJ 583, HC (refd)

Lau Kah Lay and Tang Kuong Tiew, Re; ex-parte Cold Storage (Malaysia) Bhd [1998] 2 AMR 1347, HC (distd)
Lim Hun Swee v Malaysia British Assurance Bhd (currently known as sebagai Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors) [2011] 2 MLJ 218; [2011] 1 AMCR 157, CA (refd)
Matheson, Re (1862) 31 LJ Bcy 23 (refd)
Mohana Sundari d/o M Subramaniam, Re; ex p United Prime Corp Bhd [2004] 5 MLJ 227, HC (refd)
Joshua Tan Pin Pin, Re; ex p William Jacks & Co (M) Sdn Bhd [2007] 3 CLJ 153, HC (refd)
Public Bank Bhd v Kok Lee Wah [2004] 4 MLJ 433, HC (refd)
Siah Ooi Choe, Re; ex p Hongkong and Shanghai Banking Corporation [1998] 1 SLR 903 (refd)
Siow Ah Moi @ Seow Yin Fong, Re; ex P United Orient Leasing Co Bhd [2007] 3 MLJ 713; [2007] 8 CLJ 104, HC (refd)
Tengku Elena bte Tengku Kamarulzaman, Ber v Malayan Banking Berhad [2008] MLJU 162, HC (refd)
Zanuldin Bin Ahmad v Wong Siay Patt & Chow Swee Meng [2007] MLJU 365, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 7, 33, 33(1), (3), (4), (6), (6)(c), (10), 33A, 33A(2)
Bankruptcy Rules 1969 r 194
Companies Act 1965 ss 300, 302, 304, 306
Penal Code

G Ratha (Skrine) for the appellant/judgment creditor.
Leong Kok Meng (WN Kong, KM Leong & BH Koh) for the respondent/judgment debtor.

Lee Swee Seng JC:

[1] The judgment debtor ('JD') had stood as a guarantor for a loan taken by Top In Footwear (M) Sdn Bhd ('the company'). The other guarantor was her husband Lee Chee Peau. It is a company where the husband has 80% equity and she 20%. The company defaulted on its loan and a judgment was taken against her on 30 November 2002 for the sum of RM7,009,440.56 together with interest and costs.

[2] Bankruptcy proceeding was taken against the husband under a separate judgment and he was adjudicated a bankrupt on 26 July 2001. He was discharged conditionally as a bankrupt on 20 February 2009. It was after the discharged of her husband that the judgment creditor ('JC') proceeded with a bankruptcy action against her and she was made a bankrupt on 3 December

2009. From her personal perspective, it was as if the JC was not satisfied with her husband having obtained a conditional discharge of his bankruptcy and so the JC had proceeded after that against her. The injustice she felt besides the full brunt and burden of bankruptcy was that whilst the husband had obtained a discharge, she was made a bankrupt.

[3] According to her learned counsel, Mr Leong Kok Meng, there is much bickering at home because of her bankruptcy for a failed business which was essentially that of her husband. Both husband and wife are on the brink of filing a divorce petition. The solemn vow of 'till death do us part' is more sorely tested in a financial crisis and even bankruptcy underscoring what is perhaps truer in reality that it is 'till debt do us part'.

[4] She sees herself as a housewife who was obligated to sign an unlimited guarantee for the loan taken by the company controlled by her husband which business was managed by him. She said she was not involved in the business and had no inkling in managing it. Since her bankruptcy she has been working as a babysitter eking out an existence with a meagre monthly income of RM300. The husband now works as a temporary salesman. They have three mouths to feed at home; their three children being 12 years old, 16 and 18 respectively.

[5] After two and a half years of being a bankrupt she applied for a discharge from her bankruptcy.

PRAYER

[6] The JD applied under r 194 of the Bankruptcy Rules 1969 for an order for discharge of her bankruptcy in encl 23. The DGI had duly filed his report on the conduct and affairs of the bankrupt. After hearing the parties the senior assistant registrar allowed the JD's discharge of her bankruptcy on 22 June 2012 on condition that the JD consents to a judgment being entered by the DGI for the balance outstanding of the debt proved of RM2,566,377.03 as at the date of the discharge under s 33(10) of the Bankruptcy Act 1967 ('BA').

[7] The JC who is the only creditor and who had objected to the discharge appealed by a notice of appeal to judge in chambers in encl 33. The various grounds of appeal as culled from the JC's written submission are as follows:

(a) whether the dividend proposed to be declared of 0.86% for a balance debt of RM2.5m is too low considering the period of bankruptcy of two years and six months and the JD's age of 44 in the circumstances of the case;

(b) whether the DGI's report is sufficiently detailed to assist the court in arriving at the decision that it was reasonable and just for the bankrupt to be so discharged; and

(c) whether public interest and commercial morality would be served by granting a conditional discharge order.

PRINCIPLE

Whether the dividend proposed to be declared of 0.86% for a balance debt of RM2.5m is too low considering the period of bankruptcy of two years and six months and the JD's age of 44 in the circumstances of the case

[8] It was submitted on behalf of the JD that there is no upper limit beyond which no discharge may be applied for. The wisdom of Parliament in not stating an upper limit beyond which no discharge can be applied for resonates well with the rationale for bankruptcy law which is not so much that of punishing the bankrupt but rather of providing an orderly administration of the bankrupt's estate so that creditors may be paid. The Singapore case of *Re Siah Ooi Choe, ex p Hongkong and Shanghai Banking Corporation* [1998] 1 SLR 903 at p 912 captures the reality of big business and even bigger bust as follows:

> … As far as the amount of debt is concerned, it is undoubtedly a very big one. But then, there is no upper limit set by the Act beyond which discharge is barred. The hugh amount of debt here merely reflects the fact that a big business, when it fails, tends to fall in a big way. I am sure that it is in recognition of this fact that no maximum amount is stipulated in the Act …

[9] The above observation was quoted with approval in *Re Mohana Sundari d/o M Subramaniam; exp United Prime Corp Bhd* [2004] 5 MLJ 227 and in *Development & Commercial Bank Bhd & Ors v Loke Theen Fatt* [2009] MLJU 1443; [2010] 5 CLJ 583.

[10] The amount of the outstanding debt should not be the sole determinant in the discharge or otherwise of a bankrupt. In *Re Mohana Sundari d/o M Subramaniam; exp United Prime Corp Bhd* at p 228:

> … The amount of the debt still owing to the creditor is not a factor which the court should place too much reliance on when considering an application to be discharged from bankruptcy. As the Act does not stipulate an upper limit beyond which discharge is barred, the fact that the debt owed by the judgment debtor was a big one should not be given too much weight if any at all. Another factor which was altogether not to be taken into account was the fact whether or not the bankrupt was in a position to afford and continue paying the monthly instalments …

[11] The proper perspective on the debt proportion that has been paid in a discharge application was expressed in *Public Bank Bhd v Kok Lee Wah* [2004] 4 MLJ 433 as follows:

> … It is also trite that an application is not to be rejected on the ground that all the creditor's debt have yet to be settled. The very promulgation of a discharge procedure is a statutory expression that a bankrupt may be released even before satisfying all the debts …

[12] The only provision where the proportion of debt that must be repaid is provided for is under s 33(4) of the BA where the bankrupt has committed an offence under the BA or under the relevant provisions in the Penal Code as follows:

> (4) In all cases where it is proved to the satisfaction of the court that the bankrupt *has committed any offence under this Act or under any written law repealed by this Act or under* section 421, 422, 423 or 424 of the Penal Code [Act 574] the court shall unless for special reasons it otherwise determines either refuse the discharge or suspend the operation of the order *until a dividend of not less than fifty per centum has been paid to the creditors*, and on proof of any of the facts mentioned in subsection (6) the court shall either —
>
> (a) refuse the order; or
>
> (b) suspend the operation of the order for a specified time; or
>
> (c) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or
>
> (d) grant an order of discharge subject to such conditions as aforesaid.
>
> The powers of suspending and attaching conditions to a bankrupt's discharge may be exercised concurrently. (Emphasis added.)

[13] Where the bankrupt has not committed any such offences the application for a discharge will be considered under s 33(3) of the BA and an application for a discharge can be made any time after a person has been adjudicated a bankrupt as provided for under s 33(1) of the BA. Both s 33(1) and (3) are reproduced below:

> 33 Discharge of bankrupt by order of court
>
> (1) A bankrupt may *at any time after being adjudged bankrupt apply to the court for an order of discharge*, and the court shall appoint a day for hearing the application.
>
> (2) (Deleted by Act A827).
>
> (3) On the hearing of the application the court shall *take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and*

> *affairs*, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may *either grant or refuse an absolute order of discharge, or suspend the operation order of discharge subject to any conditions* with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property. (Emphasis added).

[14] The meaning of the words 'committed any offence' in s 33(4) of the BA have been clarified and confirmed in *Development & Commercial Bank Bhd & Ors v Loke Theen Fatt* [2009] MJLU 1443; [2010] 5 CLJ 583 at p 583 as follows:

> The word 'committed' in s 33(4) of the Act meant that the bankrupt must have been charged in court by the DGI for that offence. Since the respondent had not any offence under the Act as specified under s 33(4) of the Act, it followed that the application for the respondent's discharge must be dealt with pursuant to s 33(3) of the Act …

[15] In *Zanuldin Bin Ahmad v Wong Siay Patt & Chow Swee Meng* [2007] MLJU 365, Kuala Lumpur High Court Bankruptcy No D8–29–3219 of 1999, it was held that the twin elements of a charge and a conviction must be had before a bankrupt is said to have committed an offence under the BA or under the Penal Code.

[16] It was held in *Re Joshua Tan Pin Pin; ex p William Jacks & Co (M) Sdn Bhd* [2007] 3 CLJ 153 that for so long as a bankrupt has not been charged in court for any of the offences referred to in s 33(4) of the BA and that no contempt proceedings have been taken against the bankrupt, to that extent the bankrupt is not required to pay at least 50% of the dividends as required under s 33(4) of the BA.

[17] Here there is no suggestion that the bankrupt had committed any of the offences referred to in s 33(4) of the BA. Indeed the DGI's report filed pursuant to s 33 of the BA in encl 25 made reference to the fact that the JD was adjudicated a bankrupt on 3 December 2009 and on 24 December 2009 the bankrupt filed her statement of affairs with the DGI. Throughout her bankruptcy she has been paying a sum of RM50 per month from 1 December 2009 and the monthly payments are up-to-date. She works as a babysitter with an income of RM300 per month. The DGI also confirmed in para 13 of its report that the bankrupt had not been convicted of any of the offences referred to in s 33(4) of the BA.

[18] Whilst no two cases are identical, it would nevertheless be helpful to do

a comparison with the cases where a discharge has been given with or without condition with respect to the dividend declared. Such a comparison is set out below:

In *Public Bank Bhd v Kok Lee Wah* the dividend declared was 8.26% and an unconditional discharge was given.

In *Re Joshua Tan Pin Pin*'s case a dividend of 0.93% was declared and a conditional discharge was given.

In *Ng Kok Wah v UMW Industries (1985) Sdn Bhd* [1995] 2 CLJ 284, a dividend of 9.03% was declared and a conditional discharge was given.

In *Re Ang Ah Kang's case* [1994] 2 CLJ 738, a dividend of 4.04% was declared and a conditional discharge was given.

In *Re Siow Ah Moi; Ex P United Orient Leasing Company Bhd* [2007] 8 CLJ 104, a dividend of 0.185% was declared and an unconditional discharge was given.

In *Re Rasidah Ibrahim Ex P Alliance Bank Malaysia Bhd* [2008] 9 CLJ 530, a dividend of 4.18% was declared and an unconditional discharge was given.

In *Tengku Elena Bte Tengku Kamarulzaman v Malayan Banking Berhad* [2008] MLJU 162, a dividend of 0.1% was declared and an unconditional discharge was given.

[19] The dividend proposed to be declared in the current case is 0.86% and a conditional discharge has been given by the senior assistant registrar. The conditional discharge on condition that a judgment is entered against the JD is provided for under s 33(10) of the BA as follows:

(10) The court may, as one of the conditions referred to in this section, require *the bankrupt to consent to judgment being entered against him by the Director General of Insolvency for any balance*, or part of the balance, of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts. (Emphasis added.)

[20] Another comparison can be undertaken with respect to the period of the bankruptcy before an application for discharge under s 33 of the BA. As stated there is no minimum period before which no such application may be made as the opening operative words in bold in s 33(1) are as follows:

33 Discharge of bankrupt by order of court

(1) A bankrupt may *at any time after being adjudged bankrupt apply to the court for an order of discharge*, and the court shall appoint a day for hearing the application. (Emphasis added.)

[21] It is unlike an application for discharge under s 33A(2) of the BA where the bankrupt has to wait for the expiry of five years from the date of the receiving order and adjudicating order. Section 33A of the BA is set out below:

> 33A Discharge of bankrupt by Certificate of Director General of Insolvency
>
> (1) The *Director General of Insolvency* may, in his discretion but subject to section 33B, *issue a certificate discharging a bankrupt from bankruptcy.*
>
> (2) The Director General of Insolvency shall not issue a certificate discharging a bankrupt from bankruptcy under subsection (1) *unless a period of five years has lapsed* since the date the receiving order and the order by which he was adjudged bankrupt were made.
>
> (3) Notice of every discharge under subsection (1) shall be given by the Director General of Insolvency to the Registrar and the Director General of Insolvency shall advertise the notice in a local newspaper as prescribed.
>
> (4) The Director General of Insolvency shall, upon the application of any interested person, issue a copy of the certificate of discharge to the applicant upon payment of the prescribed fee. (Emphasis added.)

[22] In the present case the application by the bankrupt is not made under s 33A(2) but under s 33(1) of the BA and so there is no expiry of minimum period for application that is applicable. The time lapsed was two years and six months from the date she was adjudged a bankrupt and by now three years have passed. I accept the submission of learned counsel for the JC, Miss G Ratha, that whilst there is no minimum period of bankruptcy before which no application to discharge may be entertained, yet it would be reasonable and fair to say that the period of bankruptcy would be a factor to be taken into consideration together with other factors like the age of the bankrupt, the conduct of the bankrupt with respect to the monthly repayment schedule, the capacity of the bankrupt to pay, the circumstance under which the loan was given and whether the JC would be prejudiced in any way with a conditional discharge subject to a judgment being entered by the DGI against the JD for the balance debt outstanding.

[23] However, each case must be decided on its own merits and no two cases are identical. The extenuating and excusing circumstance would vary from one case to another.

[24] In *Public Bank Bhd v Kok Lee Wah*, an unconditional discharge was given as the period of bankruptcy has been for ten years already. At p 439 the court was constrained to exercise compassion as it observed as follows:

> Even if I were to accept the appellant's assertion that a substantial sum still remained unpaid, I ask myself whether the predicament of having been under a cloud of bankruptcy for *such a long period, which had deprived her of business opportunities … meanwhile constantly embarrassed by the stigma could justify the discharge … in other words, the sufferings under the bankruptcy order could be equated with the balance of the debt* …. (Emphasis added.)

[25] In *Re Joshua Tan Pin Pin*'s case the court was influenced by the fact that the JD had been a bankrupt for 14 years and that he had contributed RM200 per month voluntarily for ten years to the creditors.

[26] In *Re Siow Ah Moi @ Seow Yin Fong; ex p United Orient Leasing Co Bhd* [2007] 3 MLJ 713; [2007] 8 CLJ 104 the court was merciful taking into consideration the manifold matters of age (71 years old), period of bankruptcy (20 years), health (a cancer patient) and only one creditor is opposing. Though only 0.185% dividend was declared yet the court gave an unconditional discharge and at p 728 (MLJ); p 124 (CLJ) observed as follows:

> … because the court has a discretion the court may refuse to make a person a bankrupt, in case where a person is spending his last days in death bed or such similar situations or for other good reasons which may include practical and feasible consideration …

[27] In *Ber Tengku Elena bte Tengku Kamarulzaman v Malayan Banking Berhad* [2008] MLJU 162, the bankrupt was already 62 years old and had been a bankrupt for 20 years and only nine creditors appeared to object to the discharge. Eventhough a dividend of 0.1% was declared nevertheless an unconditional discharge was given.

[28] The court's hands are not tied. The judgment seat is also the mercy seat. As was observed in no less a context as Shylock's 'pound of flesh':

> The quality of mercy is not strain'd,
>
> It droppeth as the gentle rain from heaven
>
> Upon the place beneath, It is twice blest:
>
> It blesseth him that gives and him that takes. (The Merchant of Venice)

[29] Whilst admittedly the period of the bankruptcy in the present case is much shorter (two years and six months and by now three years) and she is 42 years old, yet the circumstance under which the loan is taken is relevant. It was a loan essentially for her husband's business and the business failed. Her role was that of a housewife raising three children. She had a token 20% equity in the company no doubt but she had to guarantee the full amount of the loan

nevertheless. Now that the husband had been discharged the JC had proceeded to make her a bankrupt. The DGI had rejected the JC's proof of debt against the husband Lee Chee Peau as the JC had failed to furnish details of the security taken inspite of repeated reminders sent on 12 August 2008, 11 September 2008 and 23 October 2008. As such the husband was given a conditional discharge on 20 February 2009. See para 5 of the DGI's report.

[30] The DGI's report went on to narrate in paras 6 and 12 as follows:

> 6. On 13 March 2012 friends of the bankrupt … have deposited RM50,000.00 to help the bankrupt obtain a discharge.
>
> 12. The bankrupt has given full co-operation to the DGI's office for the past 3 years. The DGI is of the considered opinion that the conduct of the bankrupt is satisfactory and ought to be considered appropriately.

[31] It went on to confirm that no offences have been committed under s 33(4) of the BA.

[32] In the light of all the extenuating and excusing circumstances the order of a conditional discharge is reasonable and it would not cause any prejudice to the JC as execution can always be proceeded with leave of court should the JC have proof subsequently that the bankrupt has since her discharge acquired property or has income available for payment of her debts.

Whether the DGI's report is sufficiently detailed to assist the court in arriving at the decision that it was reasonable and just for the bankrupt to be so discharged

[33] It was contended by learned counsel for the JC that the DGI's report is silent on the circumstance set out in s 33(6) of the BA and whether the bankrupt had contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable ground of expectation, proof of which lie on the bankrupt, of being able to pay it.

[34] Section 33(6)(c) reads as follows:

> (6) The facts hereinbefore referred to are —
>
> (c) that the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable ground of expectation, proof whereof shall lie on him, of being able to pay it;

[35] However the facts referred to in s 33(6) would only be relevant and applicable in a case under s 33(4) where the bankrupt has committed an offence under the BA or under the Penal Code. The clear language of s 33(4) reads:

(4) In all cases *where it is proved to the satisfaction of the court that the bankrupt has committed any offence under this Act or under any written law repealed by this Act or under* section 421, 422, 423 or 424 of the Penal Code [Act 574] the court shall unless for special reasons it otherwise determines either refuse the discharge or suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors, and *on proof of any of the facts mentioned in subsection (6)* the court shall either —

(a) refuse the order; or

(b) suspend the operation of the order for a specified time; or

(c) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or

(d) grant an order of discharge subject to such conditions as aforesaid.

The powers of suspending and attaching conditions to a bankrupt's discharge may be exercised concurrently. (Emphasis added.)

[36] Little wonder that the DGI had not referred to the requirement of s 33(6)(c) nor expressed any opinion on whether the bankrupt has been guilty of it.

[37] It is therefore misconceived by learned counsel for the JC arising from her misreading of s 33(6)(c) of the BA that the bankrupt had thus far not adduced any evidence to show that she had reasonable or probable grounds of expectation of being able to pay the sum of RM5,132,754.06 out of the bankrupt's own resources at the time of contracting the same.

[38] At any rate the requirement of s 33(6)(c) of the BA must be construed liberally. If a guarantor must be required in law to have assets up to the value of the debt incurred, then the guarantor might as well not take the loan for he would have sufficient resources to finance his own business; this being a business loan and he being a shareholder and director of the company for a loan given to the company. It is not unreasonable and indeed natural and consistent with the risk and possible reward of any new venture for the guarantor to say that he expects the business to expand and bring in a reasonable return. There are of course factors beyond one's control as in the change in business environment, the risk of debtors not paying, the supply and demand factor, the costs factor and consequently price and profit-margin factor. The banks lending must be deemed also to have assessed all these various factors before lending and be prepared to take some risks when making the decision to lend. The fact remains that not all businesses will succeed in current day volatile business environment. A guarantor should not be punished more than necessary just because the business turned out to be a failure. It has been said that if a lender has no appetite for risk then it might as well not lend at all.

Nothing ventured nothing gained. The servant that received the harshest rebuke from his master was the one who when entrusted with one bag of silver, was afraid of losing it and so he dug a hole and hid it in the ground and did nothing with it!

[39] Learned counsel for the JC had also criticised the DGI's report for being brief in that no proper investigation was conducted as to:

(a) why the bankrupt was insolvent, who were the other directors of the company; and

(b) why or how a third party is willing to deposit RM50,000 on condition that he would be discharged.

[40] There is no merit in that line of argument. The reason why the JD was insolvent is obvious. She has no assets in her name. She is a housewife with no knowledge of the business which was essentially run by her husband. She now survives by working as a baby-sitter earning RM300 per month and having to take care of three growing children. She has been faithfully paying RM50 per month to the DGI. If the JC suspects that there has been fraud perpetrated then the JC could have wound up the company and proceed under s 304 of the Companies Act 1965 which reads:

304 Responsibility for fraudulent trading

(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

(2) Where a person has been convicted of an offence under subsection 303(3) in relation to the contracting of such a debt as is referred to in that section the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.

(3) When the Court makes any declaration pursuant to subsection (1) or (2), it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him, or on any charge or any interest in any charge on any assets of the company held by or vested in him or any corporation or person on his behalf, or any person claiming as

assignee from or through the person liable or any corporation or person acting on his behalf, and may from time to time make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

(4) For the purpose of subsection (3) 'assignee' includes any person to whom or in whose favour by the directions of the person liable the debt, obligation, or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1) every person who was knowingly a party to the carrying on the business with that intent or purpose shall be guilty of an offence against this Act. Penalty: Imprisonment for three years or ten thousand ringgit.

(6) This section shall have effect notwithstanding that the person concerned is criminally liable apart from this section in respect of the matters on the ground of which the declaration is made.

(7) On the hearing of an application under subsection (1) or (2) the liquidator may himself give evidence or call witnesses.

[41] There are also the provisions of s 300 on offences by officers of companies in liquidation, s 302 on penalty for falsification of books and s 306 on prosecution of delinquent officers and members of company under the Companies Act 1965.

[42] There is no difficulty in the JC furnishing the DGI with the names of the other directors of the company as that is easily available with s search from the Companies Commission of Malaysia. But to what useful purpose would that serve? Unless the directors have stood as a guarantor for the loan extended to the company, they are not liable unless there is fraud involved. Directors and shareholders of a company are separate legal entities from the company.

[43] As for the whys and wherefores of third parties depositing RM50,000 with the DGI, again their eight names have been disclosed in the DGI report at para 6. Their intent as stated was to assist the bankrupt to get a discharge. There is nothing sinister that one has to suggest as on the surface it appears nothing less than a sincere desire on the part of friends to want to help the bankrupt so that she might be spared the suffering that comes with the shame and stigma of being made a bankrupt. There is nothing to suggest that in substance there is something sinister to it. As was said ever so often a friend in

need is a friend indeed and whilst wealth may help one win a lot of friends, the true friends are those who remain when one is broke and even a bankrupt.

[44] The facts are pole apart from that of *Re Lau Kah Lay and Tang Kuong Tiew, ex-parte Cold Storage (Malaysia) Bhd* [1998] 2 AMR 1347 at p 1355 where it was observed as follows:

> While sympathising with the office of the official assignee that they have only two officers to deal with hundreds of bankruptcies, the court cannot on that factor close its eyes to an inadequate investigation as to how is it possible, for example, for the bankrupts, not to have any assets at all when they were adjudged bankrupts and whether it was a coincidence that the bankrupt Lau Kah Lay transferred his property to his wife for consideration just before being adjudged bankrupt. If the bankrupts were so poorly circumstanced, one would expect their wives to be as well but it is not the case. Though the court is not saying that any further investigation may produce any evidence of blameworthy conduct on the part of the bankrupts, the circumstances, that is the transfer of the property before being made bankrupts, and their wives being well-off while the bankrupts had no asset, must surely arouse suspicion, and they provide leads that must be followed by the official assignee. The wealth of the wives must surely be properly accounted for. Another matter that bothers me is the lack of an explanation as to why Liew Jin Nee should be so generous as to pay a sum of RM100,000 to secure the release of the bankrupts if the money does not rightly belong to the bankrupts.

[45] Under the circumstance there is no merits in the suggestion that the DGI report is insufficient or inadequate for the purpose of the court forming an opinion as to whether the bankrupt should in the circumstance set out in the said report be given a conditional discharge.

Whether public interest and commercial morality would be served by granting a conditional discharge order

[46] In *Lim Hun Swee v Malaysia British Assurance Bhd (currently known as sebagai Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors)* [2011] 2 MLJ 218 at p 231; [2011] 1 AMCR 157 at pp 165–166, His Lordship Ramly Ali JCA concisely set out the facts and the context in which the public interest element assumes great importance:

> [30] The court is aware that on the hearing of an application for an order of discharge, the court shall take into consideration a report by the DGI. This is a mandatory requirement. However, it does not mean that the court is bound to accept the statements therein contained. No doubt sub-s (8) of s 33 provides that for the purpose of an application for a discharge the DGI's report shall be prima facie evidence of the statements contained therein; but the court is duty bound to scrutinise the truth and reliability of the statements and in appropriate case, when the court is satisfied that the report is incomplete and misleading, the court is not

bound to accept the statements contained in the report. This is particularly so, as in the present case, where *the amount of debts involved are huge (about RM25m); bearing in mind the bankruptcy was initiated by the bankrupt himself (not by any of the creditors); the application for an order of discharge was only filed two years ten months after the AORO was granted; and the dividend declared is only 1% of the total debts.* The status of 'prima facie' evidence as provided under sub-s (8) is rebuttable, and not conclusive. (Emphasis added.)

[47] Further at pp 234–235 (MLJ); pp 168–169 (AMCR) His Lordship issued this cautionary advice in allowing the appeals by various JCs against the conditional discharge order given by the High Court:

> [43] The court agrees that in some appropriate cases, an individual should not remain a bankrupt and he should be able to make a fresh start as soon as he is discharged by the court. On the other hand, the court also appreciates that in bankruptcy matters, the DGI must investigate into the reason for the bankrupt's insolvency so that the interest of the creditors and the public are protected. A discharge may be refused where the bankrupt has been guilty of misconduct in a trade (although not guilty of any specific offences mentioned in s 33 of the Act). A man who finds himself insolvent ought not to continue to do business in the hope of righting himself. He is not carrying on business at his own risk, but at the risk of innocent persons who knows nothing about his condition (see *Re Badcock* [1889] 3 Mor 138 DC as reported in *William, Law and Practice in Bankruptcy*, (18th Ed)).
>
> [44] In appropriate and deserving cases, a bankrupt may be discharged from his bankruptcy, but not at the expense of commercial morality and public perception on bankruptcy law in the country. In allowing a discharge, the court must be very cautious in balancing between the interest of the bankrupt as an individual and the interest of the public and commercial reality at large. The application for a discharge can easily be abused especially in cases where the DGI has failed to carry out proper and complete investigation into the affairs of the bankrupt. There must be full and frank disclosure of all the relevant and material facts in the DGI's reports.
>
> [45] It must be noted that in the interest of the public, commercial morality must be preserved at its highest level at all times. Bankruptcy law should not be used to defeat this goal. An order for a discharge should not be granted easily without proper and complete investigation into the affairs of the bankrupt. The public as well as commercial players should not be imbued with the perception that a person can easily borrow money (even in big amount) from financial institutions or create debts with other business creditors, then stash the money away, whether in his own name or any other persons and need not be repaid; then personally apply for a bankruptcy order against him (as in the present case) and after a short period apply for an order for a discharge with a minimum or too little dividend to be paid to the creditors, and after the discharge he can enjoy a luxury life. If this practice and perception is not checked, then commercial morality would decline. In this type of fiasco, the court and the DGI should be blamed for not carrying out their duties effectively under the bankruptcy law.

[48] It must be noted that in *Lim Hun Swee*'s case the bankrupt had

committed an offence under the BA and unless there are special circumstances justifying a discharge, he would have to pay at least 50% dividends to his creditors. The Court of Appeal also took into consideration the size of the debt and the fact that it was the JD that applied to make himself a bankrupt.

[49] As has often been said, in an application for discharge, each case has to depend upon its own individual circumstances (see *Re Matheson* (1862) 31 LJ Bcy 23). Here is a case where the main person running the business of the company has been discharged conditionally and there has been no appeal. The same JC had not bothered to reply to the DGI's request to furnish details of securities taken inspite of three written reminders. The proof of debt of the JC was thus rejected by the DGI and the husband bankrupt obtained a conditional discharge on 20 February 2009. A creditor's petition was only filed against the wife JD on 21 March 2009. The debt for which she was sought to be made a bankrupt was RM3,773,918.43 as at 31 May 2002 which together with interest of RM1,595,935.94 made the whole amount outstanding ballooned to RM5,369,854.37 as at 9 July 2007.

[50] The accumulated interest has aggravated the debt owing to the JC. This court considered the fact that though judgment was entered against her for about RM7m, at the end of the day the DGI only entered judgment against her for about RM2.5m being the balance debt proved by the JC when she was given a conditional discharge.

[51] The JC as a matter of prudence would have done a credit search on the wife who stood as a guarantor for what is essentially her husband's business that failed. She is not a woman of substance but a woman of straw whose life is now one of continuing struggle to keep body and soul together for herself and her three children, with the impending separation in divorce from her husband.

[52] As stated in the conditional discharge order dated 22 June 2012 obtained before the senior assistant registrar, she consented to judgment being entered against her for the sum of RM2,566,377.03 which represented the balance debt proved and not paid yet as at the date of the order.

[53] The JC is not prejudiced in any way as it can always proceed with leave of the court should it discover that the discharged bankrupt has later acquired assets against which it can enforce its judgment. In a very real sense a borrower will always be a servant yea even a slave to his lender. A conditional discharge is a way of conditionally cancelling one's debt so that one may begin life anew and afresh.

[54] In as much as the bankruptcy laws are designed to protect creditors, it also has as its object the protection of debtors against harassment by creditors

and for the orderly administration of the bankrupt's estate so that the creditors might be paid what the debtor may reasonably afford to pay. Little wonder that the law has provision for the debtor applying for himself to be adjudicated a bankrupt in s 7 of the BA. To use a modern day analogy, when phone calls come from creditors chasing for payments and the debtor cannot take the pressure of being hounded by creditors, he can transfer all such calls to the DGI who will, from the date of his bankruptcy, administer his estate for the benefit of all creditors. To be a bankrupt is of course a harrowing experience, a sign and symbol of the stigma and shame of having failed financially in life or in business.

[55] The reality of the matter is that even if she were to faithfully pay RM50 per month as she has done hitherto for another five years, that would be RM600 X 5 = RM3,000; which is hardly a drop in the ocean.

[56] It would be apposite for us to be reminded once again of the edifying words of His Lordship Zulkefli J (as the Chief Judge then was) in *Re Mohana Sundari d/o M Subramaniam* in discharging a bankrupt of 45 years old then and holding in a balance the various complementary as well as competing factors which this court has taken into consideration:

> [10] It is my view that the conditions imposed by the learned SAR in requiring the judgment debtor to pay an increased amount from RM250 to RM300 every month until the age of 65, is onerous, oppressive and unconscionable in the circumstances of the case. It is trite law that a bankrupt must be examined as to his income and property before he is made to pay any monthly instalments to the official assignee. *The reason being that a bankrupt must be allowed to support himself and his dependants. The cardinal rule is that a bankrupt cannot be converted into a mere slave or a personal chattel of his creditors* (see the case of *Re Hawkins; Ex parte Official Receiver* [1892] 1 QB 890). In the present case when the judgment debtor applied for her discharge from bankruptcy, the SAR increased her monthly instalments from RM250 to RM300 arbitrarily without first conducting an investigation into the affairs of the judgment debtor to determine if the judgment debtor was in a position to comply with the order. It is my finding that with the judgment debtor's monthly income of RM500. It is definitely not sufficient to justify such an increase. It is noteworthy that the judgment debtor has made an effort to satisfy her creditors by earning an honest living. It is also to be noted that on the judgment debtor's application to court for a discharge from bankruptcy, after enduring almost 14 years of the same, instead of relieving the endurance of 14 years, the SAR whilst making the order for conditional discharge ordered that the judgment debtor pay an increased amount to the official assignee until she reaches the age of 65. With respect to the SAR this decision is unconscionable in the circumstances of this case.
>
> [11] Taking into account the development of the law as well as current government policy on the issue of bankruptcy, I am of the view when a bankrupt applies to court for a discharge from bankruptcy, the court should take into account and consider the following factors:
>
> (a) *the report of the official assignee as to the bankrupt's conduct and affairs including the bankrupt's conduct at the time of the bankruptcy proceedings; and*

(b) *the cause of the bankrupt's insolvency, the bankrupt's conduct relevant to his bankruptcy, the conduct of the bankrupt subsequent to his insolvency, interests of the public at large and commercial morality.* (Emphasis added.)

PRONOUNCEMENT

[57] If she has to be made to suffer for her 'sins' as a guarantor of a debt that is essentially that of a company controlled by her husband, then she has more than atone for it and it is not purgatory that she must be made to endure. Gone are the days when in ancient times, a creditor has the right to take the debtor and his family captive for a debt that a man could not repay and to be in life-long servitude as a slave until the years of endless labour could perhaps redeem it.

[58] The circumstance of this case taken as a whole would constrain this court to act in compassion and I am confident of doing so without any fear that public interest, policy and morality would be compromised in any way. The order of conditional discharge was affirmed and the JC's appeal was dismissed with no order as to costs.

POSTSCRIPT

[59] It seems that the word 'bankruptcy' has its origin in the Italian phrase 'banca rotta' which translated means a 'broken bench'. In medieval Italy, when a merchant defaults in his debt, the merchant's creditors would break his trading bench, oftentimes over his head. See *The History of Bankruptcy Laws* by Gary D Hammond and Jeffrey E Tate in *The Journal Record* of 26 September 2002. Through the years the paradigm has shifted from the element of punishing the debtor to providing for the proper administration of his estate such that creditors are paid partially and so pacified and the debtor perchance might have the prospect of pursuing again his dreams once shattered by the shackles of his bankruptcy.

Appeal dismissed with no orders as to costs.

Reported by Kohila Nesan